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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

No._____

ARTHUR JAMES COOPER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Arthur James Cooper, Sr., petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on September 7, 1988, rehearing denied October 5, 1988.

Questions Presented For Review

1. Is not the Trial Court's holding and instruction to the jury that petitioner could be convicted of wire

fraud in violation of 18 USC §1343 where the victim of the scheme suffered no loss of money or property contrary to this Court's rationale and ruling in McNally v. United States, 483 U.S. ___, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), Carpenter v. United States, 484 U.S. ___, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987)?

2. Did not Congress intend by enactment of the Victim and Witness Protection Act Pub L No. 97-291 (96 STAT) 248 (1982) (hereinafter VWPA) that witness tampering conduct be prosecuted under 18 USC §1512 and not under 18 USC §1503 from which all reference to the term witness was specifically deleted? If so, can petitioner's conviction of obstruction of justice under 18 USC §1503 for making a mere inquiry of a prospective witness stand?

3. Is not petitioner's right to inquire as to the existence and identity of potential witnesses at the direction of his attorney and as to the witness's knowledge of certain facts a meaningful adjunct to the rights to assistance of counsel, compulsory process to secure the attendance of witnesses and fair trial as guaranteed by the Sixth Amendment to the Constitution?

4. Even if 18 USC §1503 applies to threatening contact with "witnesses", did not the Court-below err in submitting the issue to the jury where petitioner's conduct was clearly non-threatening?

5. Did not the numerous erroneous evidentiary rulings as set forth below cause the jury to become confused and to base its deliberations on invalid considerations thereby depriving

petitioner of a fair trial on the charges in the indictment in violation of petitioner's Sixth Amendment rights?

(a) Was it not error on trial of a wire fraud scheme to exclude petitioner's evidence of past labor practices demonstrating that what petitioner did was permissible under the contract between Southern Stevedoring and petitioner's Union?

(b) Was it not error to admit evidence regarding petitioner's alleged misconduct before, during and after the indictment period which was irrelevant to the scheme which petitioner was charged with devising? The petitioner was shown through this evidence to have "doubled", i.e. worked for two Stevedoring companies at the same time an activity not a part of the scheme nor illegal.

(c) Was it not error to permit the Government to cross-examine petitioner's defense witnesses in a manner which exceeded the scope of direct examination and thereby lay a foundation for the introduction of inadmissible evidence in violation of this Court's holdings in Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925) and Waldor v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954)?

(d) Was it not error to exclude from evidence petitioner's written evidence offered to impeach the Government's evidence of "doubling" once the Government's evidence of "doubling" had been admitted?

Parties To The Proceeding

All parties to the proceeding in the Third Circuit Court of Appeals appear in the caption in this case.

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Opinions and Orders Of The Courts-Below

1. The judgment of the United States District Court for the District of Delaware was entered on March 23, 1988. The District Court's opinion as to the charge to be given on 18 USC §1343, Wire Fraud, is reported at 677 F. Supp. 778 (D. Del. 1988).

2. The Judgment Order of the Circuit Court of Appeals for the Third Circuit on appeal affirming the District Court Order was entered September 7, 1988.

3. Rehearing in that Court was denied by Order dated October 5, 1988. Each of the above Orders and Opinions appears in the Appendix attached hereto in accordance with Rule 21(k)(i).

Jurisdiction

Jurisdiction is conferred on the Court by 28 USC §1254(1) in that the judgments and orders sought to be reviewed are orders of the United States Court of Appeals for the Third Circuit, to wit:

1. An order of the Third Circuit Court of Appeals dated September 7, 1988 affirming the judgment of the United States District Court for the District of Delaware dated March 23, 1988, entering judgment of sentence.

2. A timely Petition for Rehearing pursuant to Rule 40 of the Federal Rules of Appellant Procedure was filed in the Third Circuit Court of Appeals on September 20, 1988. The order denying rehearing is dated October 5, 1988.

Constitutional Provision and Statutes Involved

1. The Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The case involves an alleged violation by petitioner of the following statutes:

2. Thirty-nine counts of wire fraud in violation of 18 USC §1343 which reads as follows:

> "§1343. Fraud by wire, radio, or television.
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or

promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

3. One count of obstruction of justice in violation of 18 USC §1503 which reads as follows:

"§1503. Influencing or injuring officer or juror generally.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his

person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

4. 18 USC § 1512:

"(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to -

(1) influence the testimony of any person in an official proceeding

(2) cause or induce any person to -

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as

a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(b) Whoever intentionally harasses another person thereby hinders, delays, prevents, or dissuades any person from -

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting a criminal

prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined not more than $25,000.00 or imprisoned not more than one year, or both.

(c) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(d) For the purposes of this section -

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(e) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance -

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(f) There is extraterritorial Federal jurisdiction over an offense under this section."

Statement of the Case

Petitioner, Arthur Cooper, Sr., was employed as a union timekeeper at the Port of Wilmington for 17 or 18 years. During the time period covered by the indictments pertinent to this matter, petitioner was an occasional employee of Southern Stevedoring (Southern) and such employment was governed by the

Collective Bargaining Agreement between the Stevedoring Companies and the Timekeeper's Local Union. Petitioner listed his son, Timothy Cooper, as the timekeeper on completed timesheets on certain days. Therefore, Timothy Cooper was paid for work allegedly done by petitioner. Assuming that Timothy Cooper did no work, then petitioner did the work and gave to his son the right to receive payment for which he was prosecuted. It is undisputed that when he was so listed, Southern paid only one timekeeper. The trial judge found that Southern at all times received what it bargained for, i.e., one timekeeper on days a timekeeper was required to be paid under the agreement. As such, the trial judge properly found that Southern suffered no loss of money or property as a result of the executed scheme. (App.

p. A-30).

The indictment charged that petitioner devised a scheme to defraud Southern by having Timothy Cooper paid for work which petitioner performed. Thus, the Government charged that petitioner violated the terms of the union-management agreement. Timothy Cooper testified that, in fact, he worked on time sheets at night when not in school. Under the completed scheme, there was an obtaining by Timothy Cooper, although no actual loss to Southern because Southern paid only one timekeeper (Timothy) per day. The Trial Court's instruction to the jury was that an obtaining of money was sufficient to convict petitioner of wire fraud in violation of 18 USC §1343, and that the prosecution need not prove as an element of the offense that the victim suffered

a loss of money or property.

After he was indicted on the wire fraud charges, petitioner retained counsel. Counsel instructed petitioner to determine if there was anyone who could testify. Petitioner knew one, Ken Scheffel, who had signed his son's paychecks as had Al Ciaffi, port manager for Southern, during the indictment period, but, who died in August, 1986, eleven months before the indictment was handed down and called him to arrange a meeting. Scheffel agreed to meet with petitioner at his home. When petitioner arrived he and Scheffel exchanged pleasant greetings and shook hands. Scheffel testified as to the meeting that he and Cooper had a conversation described as follows:

> "A. After the phone call, he did come down in about 30 minutes, and I met him at the car at the curb.

Q. And did you exchange pleasantries? What happened?

A. Yes. When he came out of the car, we did shake hands and he started to be able to -- be able to ask me if I was able to -- if I was able to testify that Timothy Cooper was a runner for our company.

Q. Did he say why?

A. Well, because of the indictment, you know, had to show Timothy was on our payroll.

MR. POTTER: Objection, your Honor. The question was did he say why, and I didn't hear the witness answer that question.

THE COURT: If that, in fact, was what he said, that's what the question was, Mr. Scheffel, what he said.

THE WITNESS: Yes. I realize that.

Well, shook hands at the sidewalk. He had asked -- I had asked him how he was doing. He wanted to talk to me -- talk to me about the case. He had asked his -- his lawyer asked him if anybody at the office could be able to testify that Timothy Cooper was a runner for our company.

BY MR. WEISS:

Q. Did you respond to that?

A. I did respond. I told him -- well, first I could ask him what is a runner, because I never heard of that term. He went on to be able to explain that a runner is a person who would do --who is able to do errands for the timekeeper.

I told Arthur that I couldn't do it, I could not be able to -- be able to perjure myself in that.

Q. You said you couldn't perjure yourself?

A. Yes. As far as I know, Timothy was not a runner for us." (App. p. A-98-100).

Scheffel described what took place after the conversation, saying that he:

"...did wish him the best of luck and we did shake hands and he had left." (App. p. A-105-106)

The language quoted above is from the Government's direct examination of Kenneth J. Scheffel. It is this conversation which the Government contends was evidence of petitioner's violation of 18 USC §1503. Assuming

arguendo, that 18 USC §1503 does apply to a potential Government "witness", nonetheless, the exchange cited above demonstrates no threatening, intimidating or forceful behavior of any kind on the part of petitioner nor an attempt to influence, obstruct or impede the due administration of justice.

A number of erroneous crucial evidentiary rulings were made by the trial judge. As previously stated, the petitioner in this case was tried, in effect, for violating a labor contract, that is, he did work, but placed his son's name on the time sheet. At trial petitioner offered the testimony of one, Louis Carberry, union president, to testify to the past practice of using helpers to do miscellaneous tasks who were known as "runners" such as Timothy Cooper. The Trial Court refused to

allow such testimony to the jury. (App. p. A-112-116).

The Trial Court over objection permitted the Government to introduce evidence of "doubling". "Doubling" is a term which means to do work for two Stevedoring Companies at the same time. The Government was permitted to show that Arthur Cooper was paid by a company other than Southern on the days Southern paid his son Timmy. The only scheme charged in the indictment was to obtain payment to Timothy Cooper for work done by Arthur Cooper. The fact that petitioner worked for two companies on the same day was irrelevant as beyond the scope of the crime charged in the indictment and in violation of his Sixth Amendment right to be informed of the accusations against him.

The Trial Court refused to allow

petitioner to rebut the evidence of "doubling" through the testimony of Louis Carberry, the Union President, who could testify as to past practice under the Collective Bargaining Agreement. (App. p. A-112-116). In addition, the Trial Court refused to allow use of written documents notifying companies of "doubling" to impeach Government witnesses who testified that they did not know doubling was occurring. (App. p. A-59, A-60). The documents showed that management knew for years that petitioner worked as a timekeeper for more than one Stevedoring Company at the same time.

The Government was permitted by the Trial Court to cross-examine defense witnesses beyond the scope of direct examination thereby laying a foundation

for inadmissible evidence which the Court then admitted allowing the prosecution to suggest particular wrongdoing on the part of each defense witness, all of which was irrelevant to the charge in the indictment and the matters before the jury. No proof of illegal or bad conduct was offered, only mere suggestions. As to defense witness Gwynneth Cooper, it was suggested that she filed an improper tax return in 1982. A suggestion was made that she and Timothy Cooper violated child labor laws because Timothy was under age and had no permit. These suggestions were permitted over objection of defense counsel.

Argument For Granting The Writ

1. The District Court's holding is in direct conflict with this Court's rationale and ruling in McNally v.

United States, 483 U.S. , 107 S.Ct. 2875 97 L.Ed.2d 292 (1987), and Carpenter v. United States, 484 U.S. ___, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987). In the instant case, the Government charged petitioner with violating 18 USC §1343 in that he allegedly devised a scheme to defraud Southern Stevedoring. (App. p. A-46). Yet, the District Court found that Southern lost neither money nor property when Arthur Cooper, Sr.'s son, Timothy Cooper, was paid for the timekeeping services which petitioner, Arthur Cooper, performed. The District Court found:

> "Southern Stevedoring would have been obligated under the Collective Bargaining Agreement to pay someone to be the time keeper on those 67 days. (The time period involved in the indictment). For this reason it suffered no monetary loss by having made payments to Timothy Cooper." United States v. Cooper,

677 F.Supp. 778 (D.Del. 1988). (App. p. A-30).

In the judgment order the District Court found:

> "In view of the fact that any loss suffered by Southern Stevedoring Company would have been in the form of lost services, rather than lost money and that under the instructions given to the jury it would not have been necessary to find that Southern Stevedoring did suffer a loss of services in order for the jury to arrive at the guilty verdict, restitution will not be ordered." (App. p. A-19).

The District Court's charge to the jury did not require the jury to find as a necessary element of the offense of wire fraud that the victim was defrauded, i.e., sustained a loss of money or property or that the defendant's "scheme would affect a money or property loss." The sentencing order states there was no loss. The Court explicitly held in its opinion that a scheme to obtain without a

victim sustaining a loss was sufficient to violate the statute. United States v. Cooper, supra. (App. p. A-30-31).This holding is in direct conflict with this Court's ruling in McNally v. United States, supra. In McNally, Justice White, writing for the majority, discussed the history of the statute and this Court specifically rejected the argument advanced by the Government and adopted by the District Court, in Cooper. The Government in this case argued that in McNally the language of the Statute "scheme or artifice to defraud" and "for obtaining money or property by means of false or fraudulent pretenses, representation or promise..."created two distinct and alternative offenses of this statute as those phrases should be construed independently because the two phrases

appear in the disjunctive. McNally v. United States, supra., L.Ed.2d page 301. In rejecting this argument, Justice White states:

> "As the Court long ago stated, however, the words 'to defraud', commonly refer 'to wronging one in his property rights by dishonest methods or schemes' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.' Hammerschmidt v. U.S., 265 U.S. 182, 68 L.Ed. 968, 44 S.Ct. 511 (1924). The codification of the holdings in Durland in 1909 does not indicate that Congress was departing from this common understanding. As we see it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." McNally v. United States, supra., at pages 301, 302.

The Court's opinion then states "...we read §1341 as limited in its scope to the protection of property rights." McNally v. United States, supra., at L.Ed.2d page 302. Further,

in discussing whether a mere scheme to defraud without deprivation of property rights was intended to be proscribed by Congress, the Court says there are no constructive offenses and:

> "If Congress desires to go further (than protecting property rights) it must speak more clearly than it has." McNally v. United States, supra., at L.Ed.2d page 302.

The McNally Court was not willing to usurp legislative prerogative in the application and interpretation of the statute in question.

The District Court found in its opinion on the issue of the proper wire fraud instruction to be given that "Southern Stevedoring suffered no monetary loss." The Government contended that §1343 creates both the offense of defrauding and a second distinct offense of "obtaining" which did not require a victim to sustain a

corresponding loss. The Court-below in accepting the Government's position made a ruling which is in clear contravention of this Court's reasoning in McNally as stated above. This erroneous ruling resulted in an erroneous instruction to the jury which then convicted petitioner of wire fraud. The ruling of the District Court is contrary to human expectation. Where the victim receives the benefit of its bargaining, nothing more than it expected and nothing less than it was to receive, no reasonable person can expect that a crime has occurred.

2. Petitioner was improperly convicted of one count of obstruction of justice in violation of 18 USC §1503. The facts upon which the Government based its charge were that the petitioner at the request of his

attorney to locate witnesses, met with a Mr. Scheffel, terminal manager, who had signed payroll checks for Timothy Cooper and said:

> "...his (Cooper's) lawyer asked him if anybody at the office could be able to testify that Timothy Cooper was a runner for our company." (App. p. A-99).

Petitioner asserts that he sought someone in the employer (Southern's) office to verify that for which his son was paid.(App. p.A-108-109). The Victim and Witness Protection Act (VWPA) enacted in 1982, deleted the word "Witness" from 18 USC §1503, and enacted 18 USC §1512 which made intimidating or threatening a witness a crime. The District Court denied petitioner's motion to dismiss on the basis that petitioner could not be guilty of obstruction of justice as to a "witness" under 18 USC §1503. In so ruling, the

District Court rewrote the word "witness" back into 18 USC §1503. This amounts to judicial legislation and violates the Doctrine of Separation of Powers. The question as to whether Congress intended by enactment of the Victim and Witness Protection Act that witness tampering be prosecuted under 18 USC §1512 and not under 18 USC §1503 is one of first impression in this Court, and one on which the Circuits are in conflict. United States v. Hernandez, 730 F.2d 895 (2d Cir. 1984). United States v. Lester, 749 F.2d 1288 (9th Cir. 1984). United States v. Vesich, 724 F.2d 451 (5th Cir. 1984). United States v. Risken, 788 F.2d 1361 (8th Cir. 1986). United States v. Rovetuso, 768 F.2d 809 (7th Cir. 1985) Cert. Den., 474 U.S. 1076.

Assuming arguendo that this Court

finds that conduct as to witnesses is still proscribed by 18 USC §1503, then in any event petitioner's specific conduct was not violative of that section. It was undisputed that during the conversation with Mr. Scheffel there were no raised voices, no hidden or implied threats, no bribes, no coercion and nothing from which anyone could objectively conclude that there was any kind of pressure put on Scheffel by petitioner to testify or not to testify. (App. p. A-98-100). Petitioner's inquiry, which was at the request of counsel, was to determine whether Scheffel or anybody in the office could appear as a witness on his behalf. The inquiry was logical since Scheffel's office issued the paychecks to petitioner's son.

Petitioner was not attempting to

obstruct justice by his inquiry. Rather, his inquiry was pertinent to the investigation and preparation of the case. To criminalize such conduct deprived Arthur Cooper of effective assistance of counsel and the right to secure the attendance of witnesses, thereby destroying his right to a fair trial guaranteed by the Sixth Amendment of the Constitution. Among the purposes Congress declared in enacting 18 USC §1512 was:

> "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant." 18 USCA §1512 p. 198, 1982 U.S. Code Cong. and Adm. News, p. 2515. (Emphasis supplied.)

Congress intended to preserve the defendant's rights to counsel and compulsory process and the rational

adjunct of that right; reasonable inquiry. The ruling of the Trial Court frustrates that intent and serves to chill legitimate inquiry of witnesses.

3. A series of erroneous evidentiary rulings in this complex criminal prosecution based upon alleged violations of a collective bargaining agreement deprived petitioner of a fair trial. Specifically, the Trial Court permitted a witness to testify to his speculation that petitioner had been involved in other unrelated misconduct with which he had not been charged or convicted. (App. p. A-122-124). The Trial Court permitted the Government to cross examine petitioner's defense witnesses beyond the scope of direct thus laying a foundation for otherwise inadmissible evidence which was subsequently admitted against

petitioner. The Court denied petitioner's counsel the right to impeach the credibility of the Government witnesses by written evidence. (App. p. A-118-121).

The Trial Court erroneously permitted the government to call Kenneth Scheffel who testified that the petitioner committed unrelated illegal conduct in violation of F.R.E. 404(b). At trial, Scheffel, was permitted to testify regarding his speculation that petitioner was part of a scheme with the deceased port manager which wrongly placed too many Stevedorings in labor gangs. (App. p. A-122-124).

Petitioner had never been charged with that offense which was not related to the indictment. Scheffel had no basis for such speculation. The actual proof at trial was contrary to Scheffel's

assertion.(App. p. A-123-124).Petitioner objected to Scheffel's speculation regarding this matter and was overruled.

Under F.R.E. 404(b), evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. F.R.E. 404(b). The Court's permitting Scheffel to speculate was, first of all, a violation of F.R.E. 602 which holds that a witness may not testify to a matter unless sufficient evidence is introduced to support a finding that he has personal knowledge of the matter. Speculation, therefore, was improper and should not be allowed

under any circumstances. The Trial-court magnified this error by permitting speculation as to bad conduct of the petitioner when it was not for the purpose of proof of motive, opportunity, intent, preparation, plan, knowledge, identify or absence of mistake or accident in connection with the charges in the indictment. The Government attempted to show that Arthur Cooper probably intended to defraud Southern Stevedoring because he was a bad man who was part of a scheme to pay more people in labor gangs than was appropriate. This was not an offense charged in the indictment. This is an improper use of character evidence under F.R.E. 404(b) and was prejudicial and damaging to petitioner in this case because his alleged violation of 18 USC §1343 was one only of intent since the Government

could not prove a loss of money or property.

Moreover, Scheffel's speculation was factually wrong. The number of men in the gangs was set by contract. (App. p. A-137). The number of men was verified for numerical accuracy by the alleged victim's (Southern's) comptroller's office. (App.p. A-125). Nevertheless, Scheffel was improperly allowed to speculate that petitioner was party to some wrongdoing thereby permitting the jury to find that petitioner was a man of bad character and that he engaged in other wrongdoing outside the scope of the indictment and outside the scope of 18 USC §1343. The trial judge's admission of this evidence over objection by defense counsel is in direct contravention of the ruling in Reyes v. Missouri Pacific Rail Company,

589 F.2d 791 (5th Cir. 1979). There it was held that the general rule excluding evidence of a person's character when introduced to prove conformity is based upon the assumption that such evidence is of slight probative value and very prejudicial to the petitioner. The 4th Circuit has held in United States v. Lewis, 780 F.2d 1140 (4th Cir. 1986) that for a determination under this Rule as to whether to admit evidence of prior acts the first question is whether the evidence is relevant to an issue other than the petitioner's character, and if so, the District Court must determine whether the probative value of the evidence is substantially outweighed by its prejudicial effect. In this case, the prior acts were first, speculative, second, not relevant to any issues and the prejudice clearly outweighed any

probative value.

The Trial Court also erred in admitting into evidence irrelevant allegations that petitioner had a practice of impermissibly working for and getting paid by more than one Stevedoring Company at a time. This was referred to at trial as "doubling". (App.p.A-127-137). If doubling is indeed a fraud as the Government contended, then that evidence was inadmissible as irrelevant to the charges in the indictment. F.R.E. 402. The Government's assertion required petitioner to contend that doubling was not criminal conduct. The petitioner should not have had to answer such a charge since it did not appear in the indictment. If petitioner convinced the jury that doubling was not a crime, he would not have necessarily proven

himself innocent of the crimes as charged in the indictment-wire fraud. Evidence of doubling was confusing because the jury did not know whether it was a crime. That is a matter of contract interpretation. Evidence of doubling was offered by the Government to attack the petitioner's character and show that he was a bad person. The evidence was irrelevant to the elements of the offenses with which petitioner was charged and, therefore, inadmissible. F.R.E. 402. United States v. Higgins, 362 F.2d 462 (7th Cir. 1966), cert. denied 385 U.S. 945, 87 S.Ct. 316 (1966). If, in fact, it was offered under Rule 404(b), it was also inadmissible for the reasons set forth previously set forth in this argument.

The Trial Court in effect deprived

petitioner of a defense by preventing him from rebutting the allegation that he had a covert practice of doubling. The Trial Court refused to allow the Union President (Carberry) to testify regarding past practice at the port. The defense was that this was legitimate practice in place for many years. (App. p. A-110 - 116). The Government was permitted to put into evidence several days of testimony and voluminous documents to prove that petitioner was paid money for working more than one job. The Collective Bargaining Agreement required the Stevedoring Company to pay a timekeeper for each ship in port each day regardless of how long the timekeeper must work. In other words, it was perfectly proper for a timekeeper to be paid for an eight hour day whether he worked eight hours or

fifteen minutes. The Court excluded notices of doubling which had been routinely sent to the companies for years whenever a union employee's name appeared on two companies' timesheets on the same day. These notices were admissible to impeach Government testimony. United States v. Opager, 589 F.2d. 799, 802 (5th Cir. 1979) F.R.e. 608(b).

The Trial Court also permitted the Government to cross- examine defense witnesses beyond the scope of the direct examination and thereby lay a foundation for otherwise inadmissible evidence in the form of improper conduct of defense witnesses. The Court did so in violation of F.R.E. 611(b). United States v. Balistrieri, 779 F.2d 1191 (7th Cir. 1985).

The 6th Amendment to the

Constitution guarantees a defendant a right to a fair trial. The Rules of Evidence have been promulgated to ensure that only relevant, probative and non-prejudicial facts come before a jury for consideration. The very fiber of the criminal justice system is torn when a jury is permitted to speculate about non-indicted behavior of a defendant and thereby conclude that he is a bad person. The fiber is totally destroyed when such evidence is permitted in a case where the Government is attempting to convict a defendant of a crime of intent. Assuming arguendo that one could be convicted of a crime of intent only under 18 USC §1343, then petitioner's conviction cannot stand because the Trial Court's incorrect evidentiary rulings allowed the jury to hear evidence by which it can conclude

that the petitioner was a man of bad character.

Conclusion

In view of the contentions that the Trial Court and Court of Appeals have entered finding contrary to opinions of this Court and that petitioner has suffered deprivation of a constitutional right, it is respectfully submitted that Certiorari should be granted.

POTTER, CARMINE AND HODAS

BY:

STEPHEN B. POTTER, ESQUIRE
First Federal Plaza
P.O. Box 514
Wilmington, DE 19899
Attorney for Petitioner

88-958

Supreme Court, U.S.
FILED
NOV 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No._____

ARTHUR JAMES COOPER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

APPENDIX

STEPHEN B. POTTER, ESQUIRE
POTTER, CARMINE AND HODAS
First Federal Plaza
P.O. Box 514
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Attorney for Petitioner

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UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 88-3185 & 88-3186

UNITED STATES OF AMERICA

V.

COOPER, ARTHUR JAMES, SR.,

Appellant

On Appeal from the United States District Court for the District of Delaware

D.C. Crim. No. 87-00073

(District Judge: Honorable Jane R. Roth)

Argued: August 30, 1988

BEFORE: SLOVITER, GREENBERG, and COWEN, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, to wit:

I. Appellant was improperly convicted of violating 18 U.S.C. Sec. 1343.

A. It was legal error to allow appellant to be convicted of wire fraud when the government failed to prove that he had deprived the alleged victim of the scheme of money or property, tangible or intangible.

B. Even if it is a wire fraud merely to obtain money or property by false pretense or representations, there was no proof in this case of false promise or misrepresentation.

C. Appellant's conviction for wire fraud was the product of an improper and incomplete charge to the jury.

D. The trial judge erred in denying Appellant's motion for a directed verdict at the close of the government's

case when there was insufficient evidence as a matter of law from which a jury would conclude that Appellant knew or could reasonably foresee that Southern Stevedoring payroll checks were issued through the wires.

E. The court erred in allowing into evidence irrelevant allegations of impermissible practices by Appellant, and compounded the error by refusing to permit him to put into evidence documents that would rebut the allegations.

1) Appellant was unfairly prejudiced by the testimony that he had a practice of impermissibly working for and getting paid by, more than one stevedoring company at a time.

2) Appellant was prevented from adequately rebutting the allegation that he had a convert practice of working for

two stevedoring companies on the same day.

3) The court's evidentiary rulings prevented appellant from adequately developing his defense to the wire fraud charges that he had acted in conformance with a valid collective bargaining agreement.

II. Appellant was improperly convicted of violating 18 U.S.C. §1503.

A. 18 U.S.C. §1503 as amended in 1982 does not cover any acts relating to witnesses.

B. Even if 18 U.S.C. §1503 covers witnesses, the conduct for which Appellant was convicted of violating §1503 does not amount to obstruction of justice, as a matter of law.

III. The Appellant's trial was tainted by the admission into evidence, over objection, of highly prejudicial

evidence and improper and prejudicial cross-examination of defense witnesses.

A. Scheffel's speculation about deals at the port.

B. The Skinny Wilson Statement.

C. Cross-examination of Arthur Cooper, Jr.

D. Agent Rush Testimony, it is hereby

ADJUDGED AND ORDERED that the judgment of the district court be and hereby is affirmed.

BY THE COURT,

_____
Circuit Judge

ATTEST:

_____
Sally Mrvos, Clerk

DATED: September 7, 1988

UNITED STATES COURT OF APPEALS FOR THE

THIRD CIRCUIT

September 7, 1988

Docket 88-3185,88-3186

TO: (Stephen B. Potter, Esq.
(Judy Oken Hodas, Esq.
(David C. Weiss, Esq.
(Charlene D. Davis, Esq.

NOTICE OF JUDGMENT

A Judgment-Order was entered today in case Nos. 88-3185/6 and copies are enclosed herewith.

PETITION FOR REHEARING (FRAP 40)

Your attention is specifically directed to Chapter VIII B of the Court's Internal Operating Procedures.

B. Rehearing In Banc.

Rehearing in banc is not favored and ordinarily will not be ordered except

(1) where consideration by the full court is necessary to secure or maintain uniformity of its decision, or

(2) where the proceeding involves a question of exceptional importance.

This Court does not ordinarily grant rehearing in banc where the panel's statement of law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

Nor, except in rare cases, has the court granted rehearing in banc where the case was decided by a judgment order, a memorandum opinion, or unpublished per curiam opinion.

When a petition for rehearing has been filed by a party as provided by FRAP 35(b) or 40(a), unless the petition for panel rehearing under 40(a) states explicitly it does not request in banc hearing under 35(b), it is presumed that such petition requests both panel rehearing and rehearing in banc.

J-O rev.9-85, sa

Filing Time

A petition may be filed within 14 days after entry of a judgment. No extension will be granted save for the most compelling reasons. The petition must be received in the Clerk's office within the 14 day period.

The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. No answer to a petition for rehearing will be received unless requested by the court. Oral argument in support of the petition will not be permitted.

Statement of Counsel

Where the party petitioning for rehearing in banc is represented by counsel, the petition shall contain, so far as is pertinent, the following statement of counsel:

"I express a belief, based on

a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of this Court or the Supreme Court in [citing specifically the case or cases],

Or, that this appeal involves a question of exceptional importance, to-wit [set forth in one sentence]."

Counsel is reminded that sanctions may be imposed for the filing of a frivolous petition for rehearing. See Fed.R. App. P. 46(c).

Form

The 15 page limit allowed by the Rule shall be observed.

Number of Copies

An original and 14 copies of a petition for rehearing before the Court in banc is required.

An original and 3 copies of a petition for rehearing before the original panel is required.

Rule 22.1

Attachments

Attach to each petition for rehearing a copy of the judgment, order or decision of the Court as to which rehearing is sought and any memorandum or opinion of the court stating the reasons therefor.

Bill of Costs (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment. The bill of costs must be <u>received</u> in the Clerk's office within the 14 day period.

Form Counsel desiring to have costs taxed against the unsuccessful party under Rule 39, FRAP is requested to furnish an itemized and verified statement from the printer showing the actual costs per page for reproducing

the brief and appendix (if any). Proof of service of the bill of costs must be attached to the bill.

Mandate (FRAP 41)

Issuance Time

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. A motion for stay of mandate should be promptly filed if parties intend to file a petition for writ of certiorari to the Supreme Court of the United States.

Sally Mrvos, Clerk

Enclosures

Rev.5/86

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 88-3185 and 88-3186

UNITED STATES OF AMERICA

V.

ARTHUR JAMES COOPER, SR.,

Appellant

D.C. Crim. No. 87-00073

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges

---

The petition for rehearing filed by appellant in the above-entitled case

having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the court in banc, is denied.

BY THE COURT,

_____

Circuit Judge

Dated: October 5, 1988

UNITED STATES DISTRICT COURT

____DISTRICT OF_____DELAWARE_____

UNITED STATES OF AMERICA

JUDGMENT

IN A

CRIMINAL

CASE

V.

Case Number CR 87-73/87-89

ARTHUR JAMES COOPER, SR.

(Name and Address of Defendant)
Stephen B. Potter, Esq.
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[__guilty __nolo contendere] as to

counts(s)_____

and __not guilty as to counts(s)_____

THERE WAS A:

[__finding _X verdict] of guilty as to

count(s) I thru XXXIX

CR 87-73 CT I CR 87-89

_____

THERE WAS A:

[__finding X verdict] of not guilty as to count(s)___XL_____

__judgment of acquittal as to count(s)_____

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: knowingly did cause to be transmitted sounds and signals by means of wire in interstate commerce from Miami, Florida to Wilmington Delaware in violation of Title 18, United States Code, Section 1343 and Section 2. CR 87-73

Obstruction of justice CR 87-89

IT IS THE JUDGMENT OF THIS COURT THAT:

CR 87-73

1. IT IS ADJUDGED on Counts 1

through 20 that the defendant is hereby committed to the custody of the Attorney General of the United States of his authorized representative for imprisonment for a term of one year, sentence on each of these counts to run concurrently and that defendant on each of these counts pay to the United States a fine of $500.00. The total fine imposed on Counts 1 through 20 is $10,000.00 and shall be payable on or before March 21, 1993.

2. IT IS FURTHER ADJUDGED on Counts 21 through 39 that defendant on each of these counts pay to the United States a fine of $500, the total amount of fines on Counts 21 through 39 being $9,500.00, and that imposition of the sentence of imprisonment on counts 21 through 39 is suspended and the defendant is placed on probation for a

period of five years. The terms of probation on Count 21 through 39 shall be concurrent to each other and shall be consecutive to any period of confinement imposed under Counts 1 through 20 of CR 87-73 or under CR 87-89. The period of probation is to be on the following terms and conditions:

(a) That the defendant comply with all local, state and federal laws.

(b) That the defendant comply with the rules and regulations of the Probation Office.

(c) That the defendant pay the fines, totalling $9,500, imposed under Counts 21 through 39, during the period of probation in such amounts and at such intervals as shall be determined by the Probation Office.

(d) That the defendant shall complete payment of the $10,000 fine imposed

under Counts 1 through 20 on or before March 21, 1993, payments being in such amounts and at such intervals as shall be determined by the Probation Office.

3. IT IS FURTHER ORDERED that the defendant shall pay a special assessment of $50 each on Counts 4 through 39, totalling $1,800, which amount shall be payable on or before March 28, 1988.

In view of the fact that any loss suffered by Southern Stevedoring Company would have been in the form of lost services, rather than lost money and that under the instructions given to the jury it would not have been necessary to find that Southern Stevedoring did suffer a loss of services in order for the jury to arrive at the guilty verdict, restitution will not be ordered.

1. IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of four years. The sentence of imprisonment in CR 87-89 shall be concurrent to any term of imprisonment imposed under CR 87-73.

2. IT IS FURTHER ORDERED that the defendant shall pay a special assessment of $50, which shall be payable on or before March 28, 1988.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place

of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the perior of probation, and at any time during the probation period or within the maximum probation perior of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $1,850 pursuant to Title 18 U.S.C. Section 3013 for count(s) 4-39 (CR87-73) & Ct. 1 (87-89) as follows:

Total special assessment is to be paid by 3/28/88 (See judgment section for details)

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for the district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district

X The Court orders commitment to the custody of the Attorney General and recommends:

Defendant shall self-report within two weeks from the date of this judgment.

March 21, 1988

Date of Imposition of Sentence

Jane R. Roth

Signature of Judicial Officer

Hon. Jane R. Roth, U.S. District Judge
Name and Title of Judicial Officer

3/21/88 Docket No. 81
Date

RETURN

I have executed this Judgment as follows:

_____

Defendant delivered on _____ to

_____at

_____,

the institution designated by the Attorney General, with a certified ccpy of this Judgment in a Criminal Case.

_____
United States Marshal

By

_____
Deputy Marshal

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal No. 87-73-JRR
ARTHUR JAMES COOPER, SR., and TIMOTHY JAMES COOPER,	)	
Defendants.	)	

Charlene D.Davis, Esquire and David C. Weiss, Esquire,
Assistant United States Attorney, U.S. Department of Justice, Wilmington, Delaware, Attorneys for Plaintiff

Stephen B. Potter, Esquire of Potter, Carmine & Hodas, Wilmington, Delaware
Attorney for Defendant Arthur James Cooper, Sr.

Joseph J. Longobardi, III, Esquire of Roeberg, Haase & Associates, Wilmington, Delaware
Attorney for Defendant Timothy James Cooper

O P I N I O N

February 4, 1988

Wilmington, Delaware
February 4, 1988
Docket No: 56

ROTH, District Judge

Arthur J. Cooper, Sr., has been indicted on 39 countsof wire fraud, in violation of 18 U.S.C. §1343, and on one countof conspiracy in violation of 18 U.S.C. §371. HIs son, Timothy J. Cooper, has been indicted on eight counts of wire fraud and one count of conspiracy.[1] The charges arise from Arthur Cooper's employment as a timekeeper at the Port of Wilmington. It is the responsibility of a timekeeper at the port to record for the

---

[1] Gwynneth Cooper, wife of Arthur and mother of Timothy, was also indicted on 39 counts of wire fraud and one of conspiracy. Her attorney moved for acquittal at the close of the evidence offered by the Government and judgment of acquittal in her favor on all counts was granted at that time.

stevedoring company, by which he is employed on any given day, the names, port numbers, pay rates and work hours of all longshoremen employed by that stevedoring company on that day.

The indictment in this case charges that on 57 occasions between September 10, 1984, and February 26, 1986, Arthur Cooper submitted to Southern Stevedoring Company daily timesheets which, along with the longshoremen listed, named Timothy Cooper as the timekeeper employed by Southern Stevedoring on that date.

It is further charged that Timothy Cooper was a high school student at that time and that Arthur Cooper knew Timothy was not working for Southern Stevedoring on those days.

Timothy Cooper reached the age of 18 in November, 1985, and he is charged

with wire fraud for seven occasions on which timesheets were submitted to Southern Stevedoring between November 4, 1985, and March 3, 1986.[2] Arthur and Timothy Cooper are also accused of conspiring to commit wire fraud. There is no contention by the prosecution that the Southern Stevedoring timesheets in question were incomplete or not timely submitted. Moreover, under the collective bargaining agreement between the Philadelphia Maritime Trade Association ("PMTA"), and the timekeepers' union, Local 1242-1 of the International

---

[2] The "wire fraud" offense arises from the fact that it was practice of Southern Stevedoring to transmit the payroll figures by telephone wire to corporate headquarters in Florida for checking, recording and making deductions. The data was then retransmitted by wire to Wilmington for the issuing of paychecks.

Longshoreman's Association, AFL-CIO, a timekeeper is guaranteed eight hours pay for a normal working day on which he is hired, even though the time necessary to perform the required duties may take as little as 15 minutes.

Timothy Cooper received paychecks for the 67 dates listed in the indictment and filed income tax returns reflecting that income. Arthur Cooper was employed as a timekeeper on those days by one of the other two stevedoring companies then operating at the Port of Wilmington. Southern Stevedoring would have been obligated under the collective bargaining agreement to pay someone to be the timekeeper on those 67 days. For this reason, it suffered no monetary loss by having made the payments to Timothy Cooper. There is a question of fact whether it suffered a loss of

services.

At the pretrial conference, the prosecution objected to defendants' instruction on the essential elements of wire fraud on the basis that defendants were requiring, on the authority of McNally v. United States, 107 S.Ct. 2875 (1987), that the two offenses, described in 18 U.S.C. §1343, be conjoint rather than alternative.[3]

Section 1343 provides that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication

---

[3] The mail fraud statute, 18 U.S.C. §1341, and the wire fraud statute, §1343, share the same language in relevant part and the Supreme Court has applied the same analysis to that language. Carpenter v. United States, 108 S.Ct. 316, 320, n.6 (1987).

> in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined notmore than $1,0000 or imprisoned not more than five years, or both.

The prosecution contends that §1343 creates both the offense of devising a scheme or artifice to defraud and also the offense of devising a scheme or artifice for obtaining money or property by means of false or fraudulent pretenses, representations or promises. The prosecution then asserts that the McNally decision, requiring that a scheme to defraud be one to defraud of money, property, not of intangible rights, did not conversely create in a scheme to obtain money by false representations, a requirement that a "victim" has suffered a loss of that money.

Defendant Arthur Cooper, on the other

hand, argues that the elements of the wire fraud offense in the present case are "(1) a scheme or plan to defraud of property or money, (2) to obtain by false pretenses and,(3) the use of the wire in furtherance there-of" and that defendants must have intended to cause a financial loss to Southern Stevedoring.

We are unable to accept defendants' reasoning. We acknowledge that traditionally fraud or scheme to defraud has required that there be a reliance on the misrepresentation by the person defrauded to that person's loss or damage. Id. a 2880-81. See, e.g., Black's Law Dictionary, 5th ed. ("fraud" and "defraud" defined). However, the wire fraud statute construed in McNally, was expressly written to cover not only schemes to defraud but also schemes that did not conform to the

traditional elements of defrauding. Id. at 2879-80. The "obtaining by false pretenses" language was added to the mail fraud statute in 1909 to prohibit "false promises even if they did not qualify as 'fraud' at common law." Id. at 2889 (Stevens,.,dissenting). Therefore, the decision in McNally--that the "money or property" language of the second phrase of §1341 and §1343 defines the type of loss to be suffered in a first phrase "scheme to defraud"--does not transpose into a requirement that a second phrase "scheme to obtain money by false pretenses, representations, or promises" be hereafter construed as necessitating proof of all the elements of a common law scheme to defraud. To transform, into an "and", the "or" between "scheme to defraud" and "scheme to obtain money

by false representations" would be to rewrite the clear language of the statute and to undercut the intended purpose of its second phrase. That purpose, as we have seen is to prohibit schemes to obtain money or property by false or fraudulent representations under circumstances that don't fall within the traditional definitions of fraud.

The "obtaining money by false pretenses" language of the statute states clearly what is intended. Indeed, Senator Heyburn, the sponsor of the 1909 amendment which added that language, stated that it was "self-explanatory". Id. at 2880, n.7 (quoting 42 Cong. Rec. 1026 (1908). We find as well that these words are "self-explanatory" and should be interpreted as written--the obtaining by the

misrepresenter, not the loss by the person defrauded, is the gist of the second phase.

Moreover, the above reasoning is consistent with the Supreme Court's decision in McNally. The McNally case involved a scheme in which defendants, a state political party chairman, a state official and a private individual, arranged that Wombwell Insurance Company, which had been the state's agent to secure workmen's compensation coverage, would continue in that relation-ship in return for sharing its commissions for that work with other insurance agencies, including agencies in which the defendants has an ownership interest. The defendants were prosecuted for mail fraud and conspiracy. At trial, the court instructed the jurors that the scheme to

defraud the citizens of Kentucky and its governmental departments, agencies, officials and employees of their rights to have the state's business and its affairs conducted honestly and to obtain money by false pretenses could be made out by either of two sets of findings, both based on a failure to make disclosures to state government personnel about defendants' ownership interest in insurance agencies sharing with Wombwell Insurance Co. in the commissions. The defendants were convicted on both charges. On appeal, the convictions were upheld. The Court of Appeals cited, as its basis for affirming the mail fraud convictions, a line of decisions holding that the statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government. Id. at

2879.

The Supreme Court reversed on this point, holding that the "statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." Id. The Supreme Court expressed its concern, that unless the statute was so restricted, it was not only vague but also overreaching in defining the prohibited conduct:

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Governmentin setting standards of disclosure and goodgovernment for local and state officials, weread §1341 (and §1343) as limited in scope tothe protection of property rights.Id. at 2881.

To support the above clarification of the statute, the Supreme Court overruled the earlier line of cases which held that the "money or property" language of phrase two did not limit a

scheme to defraud under phrase one. However, the purpose of the Supreme Court in McNally to remove ambiguity from the statute does not necessitate a further narrowing of the statute, as urged by the defendants, to require that phrase two be read in the future to require that a scheme to obtain money by false pretenses qualify at the same time as a phrase one common law scheme to defraud.

It is interesting to note in McNally that the Government changed its position before the Supreme Court to assert that defendants had obtained property by means of false representations to Wombwell. Id. at 2882. The Supreme Court dismissed this argument, not because it made any finding that the argument was inherently defective, but because there was nothing in the jury

charge that required such a finding. Id. The Supreme Court then held that the jury instruction, as actually given, permitted a conviction for conduct not within the reach of §1341-for deprivation of citizens' intangible right to good government.

In McNally, Wombwell lost nothing. It received what it had agreed with defendants it would receive. If the McNally jury had had the opportunity to decide whether or not defendants had obtained money or property from Wombwell by means of false representations, the circumstances would appear to have been similar to the present case. The Government in McNally did not, however, prosecute that offense. The Supreme Court refused to permit that theory to be substituted on appeal to cure the defect in the case presented below.

In the case before us, the Government has made a proper and timely charge of obtaining money from Southern Stevedoring by means of false representations made to Southern Stevedoring. We find that this offense is described by the clear language of the statute. The offense charged here does not fall into ambiguous "outer boundaries" but consists precisely of what the statutory language prohibits: obtaining money by false representations.

As the scheme here is set out in the indictment, Arthur Cooper and his son, Timothy, could not have obtained the payments to Timothy Cooper from Southern Stevedoring without making false statements on the timesheets submitted to Southern Stevedoring.Defendants argue that

someone was entitled to be paid a time-keeper for the days in question. This maybe so but, if Timothy Cooper did not do the work, he had no apparent right to be the person paid for it. To obtain the pay, he and/or his father had to make false representations to Southern Stevedoring. Because this type of conduct falls within the conduct proscribed by the language of phrase two of §1343, a scheme or artifice "for obtaining money or property by means of false or fraudulent pretenses,"we will adopt the jury instruction proposed by the prosecution, rather than that of the defendants.

(a) That the defendant comply with all local, state and federal laws.

(b) That the defendant comply with the rules and regulations of the Probation Office.

(c) That the defendant pay the fines, totalling $9,500, imposed under Counts 21 through 39, during the period of probation in such amounts and at such intervals as shall be determined by the Probation Office.

(d) That the defendant shall complete payment of the $10,000 fine imposed under Counts 1 through 20 on or before March 21, 1993, payments being in such amounts and at such intervals as shall be determined by the Probation

Office.

3. IT IS FURTHER ORDERED that the defendant shall pay a special assessment of $50.00 each on Counts 4 through 39, totalling $1,800, which amount shall be payable on or before March 28, 1988.

In view of the fact that any loss suffered by Southern Stevedoring Company would have been in the form of lost services, rather than lost money and that under the instructions given to the jury it would not have been necessary to find that Southern Stevedoring did suffer a loss of services in order for the jury to arrive at the guilty verdict, restitution will not be ordered.

CR 87-89

1. IT IS ADJUDGED that the defendant is hereby committed to the

custody of the Attorney General of the United States or his authorized representative for imprisonment or a term of four years. The sentence of imprisonment in CR 87-89 shall be concurrent to any term of imprisonment imposed under CR 87-73.

2. IT IS FURTHER ORDERED that the defendant shall pay a special assessment of $50, which shall be payable on or before March 28, 1988.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Criminal Action
	:	No. 87-73
	:	
	:	
ARTHUR JAMES COOPER, SR., GWYNNETH REGEINA COOPER, and TIMOTHY JAMES COOPER,	:	
	:	
Defendants.	:	

INDICTMENT

The Grand Jury charges that:

INTRODUCTION

1. At all times material herein, Arthur James Cooper, Sr., was a member of International Longshoreman's Association, AFL-CIO, Local 1242-1, and was employed as timekeeper by Southern Stevedoring Company, Inc., at the Port of Wilmington

in the District of Delaware.

2. At all times material herein, in his position as timekeeper for Southern Stevedoring Company, Inc., at the Port of Wilmington, it was Arthur James Cooper, Sr.'s responsibility to record, on a daily basis, the names, port numbers, pay rate and work hours of all longshoremen employed by Southern Stevedoring Company, Inc.

3. At all times material herein, in his position as timekeeper for Southern Stevedoring Company, Inc., at the Port of Wilmington, it was Arthur James Cooper, Sr.'s further responsibility to submit the daily time sheets to Francis Blake, an employee of Delmonte Fresh Fruit Company, the parent company of Southern Stevedoring Company, Inc., at the Port of Wilmington in the District of Delaware.

4. At all times material herein, it was Francis Blake's responsibility to key the information from the daily time sheets into computers for payroll purposes and to transmit the imputed data to Southern Stevedoring Company, Inc. offices in Miami, Florida by means of a wire communication.

5. At all times material herein, the payroll information transmitted to Southern Stevedoring Company, Inc. offices in Miami, Florida, was utilized to calculate weekly pay figures for longshoremen employed by Southern Stevedoring Company, Inc., and the results of the calculations were transmitted from Miami, Florida to Southern Stevedoring Company, Inc. offices at the Port of Wilmington by means of a wire communication.

6. At all times material herein, the

weekly pay figures, transmitted by wire from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, were utilized to issue pay checks to longshoremen employed by southern Stevedoring Company, Inc. at the Port of Wilmington.

7. At all times material herein, Timothy James Cooper, son of Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, was enrolled as a student at William Penn High School, New Castle, Delaware.

8. At all times material herein, Gwynneth Regeina Cooper maintained bank account number 9736-1142 and bank account number 9736-1290 at Wilmington Trust Company, Wilmington, Delaware, as custodian for Michelle R. Cooper and Timothy Cooper, respectively.

THE SCHEME TO DEFRAUD

9. Beginning on or about the 10th day of September, 1984, and continuing to on or about the 3rd day of March, 1986, in the District of Delaware, Arthur James Cooper, Sr., Gwynneth Regeina Cooper, and Timothy James Cooper devised and intended to devise a scheme and artifice to defraud and to obtain money and property from Southern Stevedoring Company by means of false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be and were false when made, and which scheme and artifice to defraud so devised and intended to bedevised by said defendant was in substance as follows.

10. It was part of said scheme and

artifice to defraud that defendant, Arthur James Cooper, Sr., in his capacity as timekeeper at Southern Stevedoring Company, Inc., did submit daily time sheets which listed Timothy J. Cooper, port number 14975, as an employee of Southern Stevedoring Company, Inc., at the Port of Wilmington on the following dates:

September 10, 1984
September 11, 1984
September 12, 1984
September 17, 1984
September 18, 1984
September 19, 1984
September 24, 1984
September 25, 1984
September 26, 1984

October 9, 1984
October 15, 1984
October 22, 1984
October 23, 1984

November 5, 1984
November 7, 1984
November 12, 1984
November 13, 1984
November 14, 1984
November 29, 1984

April 2, 1985
April 30, 1985

May 9, 1985
May 13, 1985
May 15, 1985
May 17, 1985
May 28, 1985
May 29, 1985
June 3, 1985
June 4, 1985
June 5, 1985
June 12, 1985

September 24,1985
September 30,1985

October 7, 1985
October 8, 1985
October 9, 1985
October 15, 1985
October 16, 1985
October 21, 1985
October 28, 1985

December 4, 1984
December 11, 1984
December 17, 1984
December 19, 1984
January 8, 1985
January 9, 1985
January 10, 1985
January 16, 1985
January 22, 1985
January 30, 1985
January 31, 1985

February 6, 1985
February 7, 1985
February 19, 1985
February 20, 1985
February 22, 1985
March 20, 1985

November 6, 1985
November 25, 1985
November 27, 1985
December 10, 1985
December 16, 1985
December 17, 1985

January 13, 1986

February 19, 1986
February 25, 1986
February 26, 1986

said defendant, Arthur James Cooper, Sr., well knowing that Timothy James Cooper was not working for Southern Stevedoring Company, Inc., on the specified dates.

11. It was further part of said scheme that the defendants, Arthur James Cooper, Sr., Timothy James Cooper, and Gwynneth Regeina Cooper caused Southern Stevedoring Company, Inc., to issue paychecks made payable to Timothy James

Cooper to compensate him for employment on the dates listed in paragraph 10 above, said defendants well knowing that Timothy James Cooper was not employed by Southern Stevedoring Company, Inc., on those dates.

12. It was further part of said scheme that the defendants, Arthur James Cooper, Sr., Gwynneth Regeina Cooper, and Timothy James Cooper, variously, obtained Southern Stevedoring Company, Inc., payroll checks issued to Timothy J. Cooper in payment for employment on the dates listed in paragraph 10 above and cashed the checks or deposited them to bank accounts, including Wilmington Trust Company bank account numbers 9736-1290 and 9736-1142.

COUNT I

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or abut the 17th day of September 1984, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr., and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT II

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or about the 24th day of September, 1984, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of the aforesaid scheme and artifice and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT V

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or about the 22nd day of October 1984, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr., and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc., offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT VI

The Grand Jury alleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or about the 29th day of October 1984, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT VII

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or about the 12th day of November 1984, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT VIII

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or about the 19th day of November 1984, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, and for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT IX

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or about the 3rd day of December 1984, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT X

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or about the 10th day of December 1984, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XII

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or about the 24th day of December 1984, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XIII

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or about the 14th day of January 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XIV

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or about the 21st day of January 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XV

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or abut the 28th day of January 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XVI

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or about the 4th day of February 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XVII

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or about the 11th day of February 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XVIII

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this

Indictment.

On or about the 25th day of February 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Souther Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XIX

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 25th day of March

1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XX

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 8th day of April 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Souther Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXI

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 6th day of May 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Souther Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXII

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 13th day of May 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Souther Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

XXIII

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 20th day of May 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Souther Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXIV

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 3rd day of June 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Souther Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXV

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 10th day of June 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Souther Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXVI

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 17th day of June 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXVII

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 30th day of September 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXVIII

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 7th day of October 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Souther Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXIX

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 14th day of October 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXX

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 21st day of October 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Souther Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section

COUNT XXXI

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 28th day of October 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr. and Gwynneth Regeina Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Souther Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXXII

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 4th day of November 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr., Gwynneth Regeina Cooper, and Timothy James Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and

Section 2.

COUNT XXXIII

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 11th day of November 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr., Gwynneth Regeina Cooper, and Timothy James Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18,

United States Code, Section 1343 and Section 2.

COUNT XXXIV

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 2nd day of December 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr., Gwynneth Regeina Cooper, and Timothy James Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy

James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXXV

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

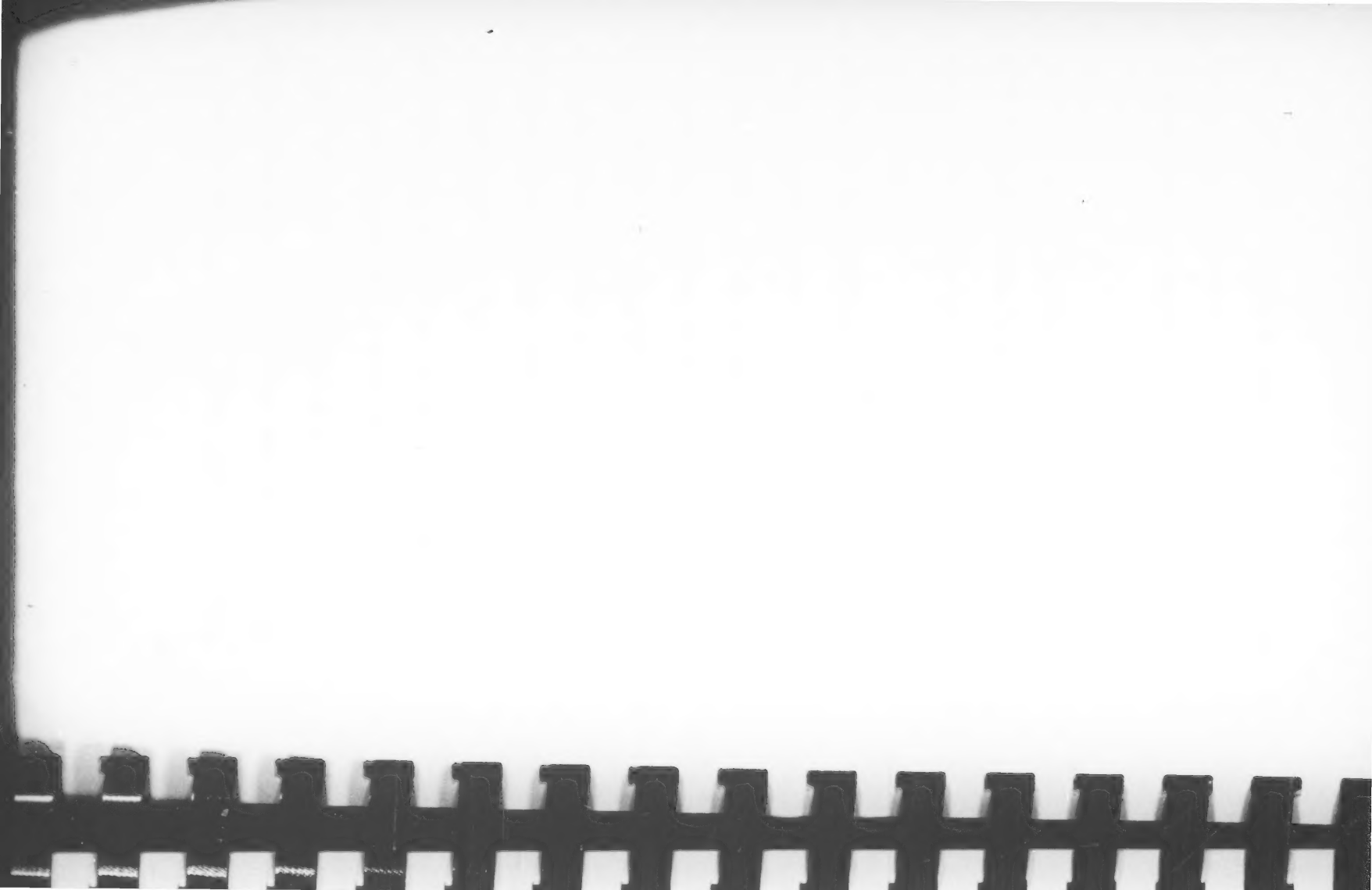
On or about the 16th day of December 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr., Gwynneth Regeina Cooper, and Timothy James Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals

conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXXVI

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 23rd day of December 1985, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr., Gwynneth Regeina Cooper, and Timothy James Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington,



Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXXVII

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 20th day of January 1986, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr., Gwynneth Regeina Cooper, and Timothy James Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring

Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXXVIII

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 24th day of February 1986, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr., Gwynneth Regeina Cooper, and Timothy James Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern Stevedoring Company, Inc. offices in

Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XXXIX

The Grand Jury realleges all of the allegations in paragraphs 1-12 of this Indictment.

On or about the 3rd day of March 1986, in the District of Delaware and elsewhere, defendants Arthur James Cooper, Sr., Gwynneth Regeina Cooper, and Timothy James Cooper, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did cause to be transmitted sounds and signals by means of wire in interstate commerce from Southern

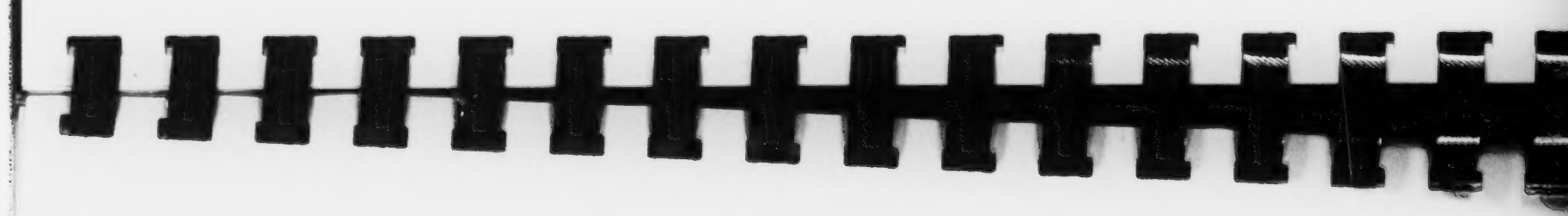
Stevedoring Company, Inc. offices in Miami, Florida to Southern Stevedoring Company, Inc. offices in Wilmington, Delaware, which sounds and signals conveyed weekly pay figures for Timothy James Cooper, in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT XL

From on or before September 1984, up to and including March 1986, in the District of Delaware and elsewhere, Arthur James Cooper, Sr., Gwynneth Regeina Cooper, and Timothy James Cooper did knowingly combine, conspire , confederate, and agree to commit the offenses against the United States, that is to say, to cause to be transmitted sounds and signals by means of wire in interstate commerce, in furtherance and execution of a scheme and artifice to

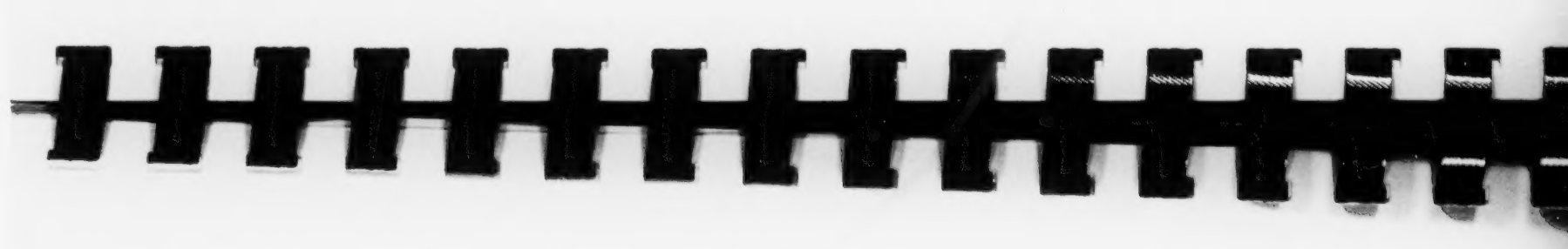
defraud and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, said scheme and artifice to defraud being set forth more fully in paragraphs 1-12 of this Indictment, all of which is incorporated by reverence herein, the object of said conspiracy being violations of Title 18, united States Code, Section 1343, and in furtherance thereof caused to be committed the following overt acts:

1. On numerous occasions between the 10th day of September 1984 and the 27th day of February 1986, Arthur James Cooper, Sr. submitted or caused to be submitted daily time sheets to Southern Stevedoring Company, Inc. in Wilmington, Delaware on which he had indicated or caused to be indicated that Timothy James Cooper was working for Southern



Stevedoring Company, Inc. on specified dates, Arthur James Cooper, Sr. well knowing that Timothy James Cooper was, in fact, attending classes at William Penn High School on those dates.

2. On numerous occasions from the 10th day of September 1984 through the 27th day of February 1986, Francis Blake, an employee of Delmonte Fresh Fruit Company, the parent company of Southern Stevedoring Company, Inc., transmitted information from the daily time sheets, indicating that Timothy James Cooper had worked for Southern Stevedoring Company on dates when Timothy James Cooper was, in fact, attending classes at William Penn High School, said transmission accomplished by means of wire communications in interstate commerce from Wilmington, Delaware to Miami, Florida.



3. On numerous occasions from the 10th day of September 1984 through the 27th day of February 1986, Francis Blake, an employee of Delmonte Fresh Fruit Company, the parent company of Southern Stevedoring Company, Inc., received payroll information pertaining to Timothy James Cooper, transmitted by means of wire in interstate commerce from Miami, Florida to Wilmington, Delaware, and utilized said payroll information to print paychecks payable to Timothy James Cooper, which included payments for days when Timothy James Cooper was attending classes at William Penn High School.

4. On numerous occasions from the 10th day of September 1984 to the 26th day of February 1986, Southern Stevedoring Company, Inc. paychecks described in paragraph 3 immediately

above and made payable to Timothy James Cooper, were deposited to Wilmington Trust Company bank account numbers 9736-1142 and 9736-1290, said accounts held in the name of Gwynneth R. Cooper, as custodian for Michelle R. Cooper and Timothy Cooper, respectively.

5. On numerous occasions from the 11th day of November 1985 through the 27th day of February 1986, the paychecks described in paragraph 3 immediately above and issued to Timothy James Cooper by Southern Stevedoring Company, Inc. were endorsed by Timothy James Cooper. All in violation of Title 18, United States Code, Section 371.

A TRUE BILL:
Mary B. Fahey

_____
Foreperson

William C. Carpenter, Jr.

United States Attorney

By: Charlene D. Davis
Assistant United States Attorney

July 21, 1987

Docket No: 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Criminal Action No. 87-89
	:	
ARTHUR JAMES COOPER, SR.,	:	
	:	
Defendant.	:	

INDICTMENT

On or about the 30th day of July, 1987, in the Judicial District of Delaware, Arthur James Cooper, Sr. corruptly did endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the District aforesaid, in that the said Arthur James Cooper, Sr. having been indicted and facing trial for violations of Title 18, United States Code, Section 1343 urged and advised, Kenneth Scheffel to give

false testimony on behalf of said Arthur James Cooper, Sr. and his codefendants, in relation to the aforesaid violations, all in violation of Title 18, United States Code, Section 1503.

A TRUE BILL:

Sharon Wheeler
Foreman

WILLIAM C. CARPENTER, JR.

United States Attorney

By: Charlene D. Davis

Assistant United States Attorney

Docket No.: No number assigned by the Court

Q: And how much later did Mr. Cooper come by?

A: After the phone call, he did come down in about 20 minutes, and I met him at the car at the curb.

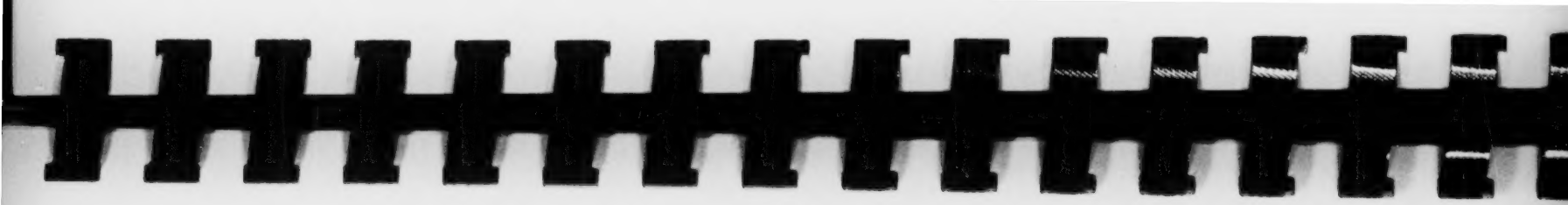
Q: And did you exchange pleasantries? What happened?

A: Yes. When he came out of the car, we did shake hands and he started to be able to -- to be able to ask me if I was able to -- if I was able to testify that Timothy Cooper was a runner for our company.

Q: Did he say why?

A: Well, because of the indictment, you know, had to show Timothy was on our payroll.

MR. POTTER: Objection, your Honor. The question was did he say



why, and I didn't hear the witness answer that question.

THE COURT: If that, in fact, was what he said, that's what the question was, Mr. Scheffel, what he said.

THE WITNESS: yes. I realize that.

Well, shook hands at the sidewalk. He had asked -- I had asked him how he was doing. He wanted to talk to me -- talk to me about the case. He had asked his -- his lawyer asked him if anybody at the office could be able to testify that Timothy Cooper was a runner for our company.

BY MR. WEISS:

Q: Did you respond to that?

A: I did respond. I told him -- well, first I could ask him what is a runner, because I never heard of that term. He went on to be able to explain that a

runner is a person who would do -- who is able to do errands for the timekeeper. I told Arthur that I couldn't do it. I could not be able to -- be able to perjure myself in that.

Q: You said you couldn't perjure yourself?

A: Yes. As far as I know, Timothy was not a runner for us.

Q: What happened next, if you recall?

A: The -- well, I told him that I -- you know, that he was-- that he has known that I was not part of any type of deals made at the port.

Q: What does that mean?

A: For instance, on our payroll, there were names on there which --

MR. POTTER: Objection, your Honor.

MR. CROSSE: Objection.

MR. LONGOBARDI: Objection.

MR. POTTER: I think

the Court has already ruled on the question Mr. Weiss is pursuing.

THE COURT: This is what the witness meant by his own statement, not what someone else may have meant by a different statement. It was not the subject of the prior discussion, this limited area, Mr. Potter.

MR. POTTER: Your Honor, perhaps we ought to approach

THE COURT: Now, that's the interpretation, and we went through that on voir dire and and you had a chance to register your objections. We went through the other testimony and I said to you Mr. Potter, you know, what are your objections, to what part of the conversation? We've been through that. We aren't going to go through it all over again.

You did not register an objection at that time.

MR. POTTER: I'm not objecting to the conversation. What I'm objecting to at this point is what Mr. Scheffel was thinking, and that was not part of any o the questions that I asked him before, although I don't wan to --

THE COURT: The

questions that Mr. Weiss asked were -- are down on the transcript. They include what the witness is testifying to now. It was not objected to. The witness is defining now the terms he's using. I think that's appropriate. Your objection is on the record.

MR. POTTER: Thank you.

(End of the side bar conference.)

BY MR. WEISS:

Q: Mr. Scheffel, just to get back to where we were, you had testified that you didn't know anything about any deals, and my question is, what did you mean by saying -- by this reference to deals?

A: All right. On our payroll there are -- there were individuals that I had felt were not a t the work site, okay. the number of men that were on the

payroll was more than the actual men that we needed to do the job. Okay. It was obvious that there was some type of deal done between the terminal manager and also Arthur Cooper.

Q: Now, did Mr. Cooper respond to your statement about deals and your not wanting to be a part of any deals?

A: Well, when I was talking to him about it, that I was not part of any deals, I did not know what the deals pertained to. He informed me that the deals was that Arthur Wilson, the president of the local, was supposed to be able to receive $250.00 for every vessel that comes to the port.

Q: Was anything further said?

A: After that, you know, I did feel bad for him that I wasn't able to help him you know. I told him why didn't he just use Al's name? The gentleman was dead,

you know, it was a good -- was a good way to try to get out of it.

Q: You were talking about Al Ciaffi?

A: Yes, I am.

Q: And did Mr. Cooper respond to that?

A: As --

Q: If you can recall?

A: He did make a statement as if, you know, maybe that's the -- that is the -- that is the way I have to go.

Q: How did Mr. Cooper react, if you recall?

A: Well, since the indictment time, he looked depressed. Okay. And after the conversation that I had with him, he was, you know, he couldn't have been happy, so ...

Q: What, if anything, did you do after the conversation was completed?

A: I did -- I did wish him the best of luck and we did shake hands and he had

left.

Q: Did you do anything after Mr. Cooper left?

A: After he had drove off, I had thought about it a couple minutes and I did go into my home and I called up the terminal manager, to be able to tell him that I had a meeting with Arthur Cooper.

Q: You had what?

A: That I had a meeting with Arthur Cooper.

Q: Now, the terminal manger at that time was who?

A: Mike Schiro.

Q: Now, did you have an occasion to speak with Arthur Cooper, Sr. about this matter again subsequent to the initial conversation?

A: yes. I don't recall the time, but one day Arthur came into my office and I told him that I was sorry, but I had to do it.

Q: What were you sorry for?

A: For basically telling the authorities, you know, what has occurred.

THE WITNESS: Yes, Sir.

BY MR. POTTER:

Q: That's what he -- yes. That is what he asked, if you could make a statement?

A: yes, sir.

Q: And there is no place in that statement, this, what you said to the FBI, that talks about court; is that correct?

A: Yes, sir.

Q: And in the paragraph that you were asked to make a statement, there's discussion about a lawyer; correct?

A: Yes, sir.

Q: If you can recall at this point your conversation, didn't Mr. Cooper ask you to make a statement to his lawyer, to his lawyer?

A; No, Sir.

Q: Mr. Scheffel, that conversation that Mr. Cooper had with you was one in which he asked you to verify his -- the employment of Timmy. Isn't that what he asked you to do?

Verify employment? He asked you to say that that is what Timmy was paid for, that Timmy was paid for something? Isn't that what he asked you to do? Verify the employment of his son?

A: In a way, yes, yes.

Q: Now, you signed Timothy's paychecks approximately 35, 37 times; is that correct?

A: Yes, sir.

MR. POTTER: Your Honor, there is, I believe, the admission under 803, and I also believe it's admissible under 803(24), which is the other exception under the federal rules.

THE COURT: Prior notice, Mr. Potter.

MS. DAVIS: Prior notice.

THE COURT: There has not been prior notice.

What was the first one?

MR. POTTER: 803, presence of impressions, existing mental and emotional condition. The statement of the declarant, in this case, Mr. Marks, as to his understanding, intent, plan, motive, design would be a basis for putting that in. But let me offer

additional testimony, which I believe exists from Mr. Carberry on this other question of prior notice.

MR. WEISS: Your Honor, if I may interrupt for one second.

Another problem is we are basing this -- and maybe this is a justifiable hearsay exception, although I don't think it is -- a hearsay exception for someone who's not here from what was said 13, 14 years ago from somebody who's now deceased.

MR. POTTER: From what you've heard under this contract and from what the testimony had been from the -- Mr. Kelly from the PMTA, this contract essentially memorialized past practices. That's what the contract does.

Carberry hearing something from somebody 15 years ago. I think the hearsay

aspect of it is not supportable, and I think Mr. Carberry's ability to testify to current port practices at the Port of Wilmington, based on what he knew 14 years ago, would be extremely prejudicial and minimally probative in this case.

MR. POTTER: Your Honor, may I take one more moment, please, to look it up? I think there's another rule that has that, if I may just take one more minute.

THE COURT: Well, Mr. Potter, I'm going to permit the witness to testify as to his personal observations at the Port of Wilmington. I am not going to permit him to testify as to any so-called agreement between Mr. Wright and Mr. Marks. I think that is hearsay. I think it's so long ago.

I think when one is

dealing with the formation of an agreement between the company and a union, that if there was such an agreement, if it was a specific agreement, if it was an agreement by simply permitting things to happen, if it was one person saying it was an agreement to protect the interests of one party as opposed to another entity not knowing it was going on at all -- all of this is not open to cross-examination, and therefore I'm not going to permit this witness to testify as to any agreement that this is the way things would proceed based strictly upon hearsay.

MR. POTTER: May I have just a minute, you Honor, please? I understand you Honor has ruled, but I would like to

but there is a basis for his perception

and there is a basis for his conclusion.

Now, it seems to me that it may be left to the government on cross-examination to cross-examine how he achieved his perception that Mr. Cooper has been permitted for these 13 or 14 years to work double ships at the Port of Wilmington and I would like to ask him at that point whether or not there has ever been any efforts that he's aware of to alter that custom and use under this contract.

THE COURT: Mr. Potter, on the basis of Mr. Carberry's testimony that his conclusion was based upon seeing Mr. cooper working as a timekeeper at a time when there was-- other than the ship Mr. Carberry was working on, two or more other ships that were in the port, that Mr. Carberry did not recognize any other timekeeper, that

Mr. Carberry did not know if these ships were being worked by Wilmington or by Philadelphia stevedoring or, in fact, whether these ships might be being worked by the same Wilmington Stevedoring Company and that he did not, in fact, see Mr. Cooper filling out time sheets for more than one ship, I'm not, on the basis of that testimony, going to permit this witness either to testify that doubling was permitted in Wilmington in 1974, '76 or that it is permitted today.

I will let him testify as to what he observed in the Port of Wilmington. I will let him testify, since he's familiar with the contract, as to what he knows about whether it states in the contract that there can or cannot be doubling and whether it states that past practices will be maintained.

But I will not let him pull out from his -- the nature of the observation be made in the mid-1970s, the conclusion that doubling is permitted in Wilmington at the present time or in 1984, '86.

MR. POTTER: All right.

THE COURT: Do you want to bring the jury in?

(The jury entered the courtroom and took their seats in the box).

DIRECT EXAMINATION. Resumed

BY; MR. POTTER:

Q. Mr. Carberry, I don't recall whether you testified of the total number of men in your union?

A. 11.

Q. And do you know how many stevedoring companies there are in the PMTA, stevedoring and shipping companies?

A. Stevedoring companies? Philadelphia

has five primary ones and I think there are three primary stevedoring companies in Wilmington and some fringe outfits come in and out that do other work.

We have an outfit in Philadelphia that does strictly oar and pen-type work. I don't consider that a primary company.

F-70

MR. POTTER: May I take one minute, please, Your Honor?

THE COURT: Yes.

MR. POTTER: Your Honor, I believe that this gentleman has testified that he received letters of this kind, that this is his company, and it was received on occasions when a person was apparently working at two places at one time. So that the authenticity of this type of correspondence has been demonstrated by Mr. Mullen in his remarks as part of the background information.

If you will recall, Your Honor, Mr. Mullen has testified on direct examination a few days ago when I was ill-prepared to cross on this question.

He testified that he had no knowledge or notice that there was doubling going on. So that the point of this letter, Your Honor, is for impeachment.

THE COURT: Well, then, I won't admit it.

MR. POTTER: I am sorry, Your Honor?

THE COURT: Then I won't admit it if it is for impeachment. Extrinsic evidence used for impeachment purposes routinely I do not permit to be entered into evidence as exhibits. So I think that ends it.

MR. POTTER: Your Honor, may I be heard on that question, because it seems to me--

THE COURT: If you are using it for credibility, Mr. Potter, I will not admit it, and you just said you are using it for credibility.

MR. POTTER: Then I will change it

to offer it as a business record, and may I lay an additional foundation?

THE COURT: I think we have dealt sufficiently with it, Mr. Potter. You want to use it for credibility and I am not going to admit it.

MR. POTTER: I am having a little trouble understanding, Your Honor. This man has testified to the contrary --

THE COURT: Yes, that is evidence before the jury, but I will not admit the letter as extrinsic evidence on matters of impeachment.

The next point is the statement of Mr. Carberry.

MS. DAVIS: Yes, Your Honor. The government had occasion over the lunchtime recess to review the memorandum of law and, quite frankly, I am confused. I am not quite certain what it is that Mr.

Carberry is going to be asked to testify to. There seem to be at least three or four alternative things which Mr. Potter indicates he is attempting to prove

BY MR. WEISS:

Q. Mr. Scheffel, I think the last question I asked you was whether you ever noted any other irregularities when you review time sheets?

A. Yes, sir.

Q. And did you bring those irregularities to Mr. Ciaffi's attention?

A. Yes, sir.

Q. And what did he say or do about those irregularities?

A. He would say that I will be able to look into it or it's okay. You know, just basically trying to brush me off.

Q. And what were the nature of those irregularities?

A. They were individuals that I thought were not being able to work for us.

Q. You say being able to work --

A. Well, they were not -- I felt that they were not present at the job.

Q. And what would you do about that?

A. I could ask him about it.

Q. And, again, what would he say?

A. He would say we'll either be able to look into it or that you don't have to worry about it.

Q. Did you ever hear anything further?

A. No, sir.

Q. Did the name stop appearing?

A. No, sir. They were pretty regular.

Q. Did that have anything to do with your suspicions as to Tim Cooper name?

A. It had added to it.

Q. Now, Mr. Potter asked you if you ever approached Arthur Cooper, Sr. and asked him whether Tim Cooper was not a new employee, was now working as timekeeper, and you never did, did you?

A. Correct.

Q. Did Mr. Cooper ever approach you and say anything about his son Timothy working?

A. No.

Q. As a timekeeper?

A. No, sir.

Q. Did Mr. Ciaffi ever tell you that Tim was working as a timekeeper?

A. No, sir.

Q. Did anybody with Southern Stevedoring ever tell you that Mr. Tim Cooper was working as a timekeeper?

A. No, sir.

MR. WEISS: I have nothing further, your Honor.

can hear you.

A. Yes. Information was received from the port and came from the Wilmington office, the computer terminal to the terminal in Miami. So the information was inputted in the computer and, you know, the pay raise developed from that information.

Q. I'm sorry?

A. The payroll register was developed from that information.

Q. Once you received the information from the Port of Wilmington by computer, what did you do -- what did your department do with it in Miami?

A. One of the employees, you know, checked the accuracy, the hours, the men involved and the proceeded, you know, to come up with the payroll register.

Q. And when you say they checked the accuracy, you mean the computations?

A. Mathematical accuracy.

Q. And once you did the payroll deduction process, once that was completed, what did you do with the information that you obtained?

A. Information obtained, you know, was transferred to the terminal in Wilmington. The checks were issued in the terminate and then the rest of the information we used to make the appropriate payments to the government for payroll taxes and

THE COURT: Very good.

BY MR. WEISS:

Q. Mr. Mullen, to the best of your recollection, have you ever been asked by Arthur Cooper, Sr. or any other casual or extra timekeeper if he could work and get paid by another stevedoring company for the same time and the same hours that he worked for your company?

A. Not to the best of my knowledge.

Q. And if he had asked that question, would you have allowed it?

A. No.

Q. Does the company condone that policy?

A. No, we do not.

Q. How long have you known Arthur Cooper, Sr. for?

A. At least 20 years.

q. How would you describe your relationship?

A. Well, friendly.

MR. WEISS: I have nothing further, Your Honor.

THE COURT: Mr. Potter.

MR. POTTER: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. POTTER:

Q. The prosecutor asked you if you condoned the policy of one timekeeper working two ships. I am not going to ask you if you condone it. Is there anything that you are aware of in the contract that prohibits that?

MR. WEISS: Your Honor, I am going to object unless a foundation can be laid as to his familiarity with the contract.

MR. POTTER: Okay, Your Honor.

BY MR. POTTER:

Q. Mr. Mullen, have you read the

contract?

A. Yes.

Q. Have you worked with the timekeepers' contract for some years?

A. Yes.

Q. Are you aware there is a new contract from 1986 to 1989?

A. Yes.

Q. Have you read that contract?

A. No.

Q. You work with your timekeepers essentially attempting to live by the contract that you have with them?

A. Yes.

Q. That is fair to say. Now--

MR. POTTER: Your Honor, I am going to suggest to the Court that I have laid an adequate foundation. I don't know whether the government is going to argue with that question.

MR. WEISS: May I have a brief voir dire?

THE COURT: Yes.

BY MR. WEISS:

Q: Mr. Mullen, do you have a specific recollection of the contract between 1983 and 1986?

A: I am familiar with it.

Q: Do you know the specific sections of that contract?

MR. POTTER: I am going to object to that, Your Honor. I didn't ask him specific questions. I am asking him whehter or not his is familiar with the contract for the purposes of him being able to work with the contract. As that is not a question as to whehter or not he is going to be able to --

THE COURT: This is appropriate voir dire.

You may ask the question.

BY MR. WEISS:

Q: Are you familiar with the specific sections of that contract ans what those sections read?

A: In general, I am familiar with the contract.

MR. WEISS: Your Honor, perhaps we could discuss this at sidebar, anticipating what Mr. Potter's ultimate question is going to be.

THE COURT: All right.

(the following took place at sidebar.)

MR. WEISS: Your Honor, my concern is that, although he his generally familiar with the contract, I grant that, and the company certainly tries to perform its responsibilities in accordance with the terms of the contract, I don't know that Mr. Mullen has the expertise to answer the specific question as to whether a

particular provision acutally prohibits the specific policy that we are talking about here. A witness -- not the next witness but the witness after that, Mr. Kelly, from the PMTA, I think will be in aposition to answer that specific question.

MR. POTTER: Your Honor, the prosecutor asked him whether he condoned a policy. Now , it seems to me that I have the right on cross-examination to say -- to find out whether or not that is his contract interpretation, because he is going to live with this contract on a day-to-day basis, he is the one who works with it. I should be in a position to be able to say, what is this all about, when the government asks you to condone it. He might not like it, but the question is, what does he have to live with. And Mr. Kelly from the

PMTA is not an arbitrator, from our point of view, Your Honor. He is merely an advocate from the employer's side.

THE COURT: Well, he is one of the contracting parties.

MR. POTTER: Yes, he is. But Mr. Weiss' contention that Mr. Kelly is going to straighten out this issue, as if he was the one to decide, all I am syaing is, Mr. Kelly is merely an adversary in this process.

MR. WEISS: Your Honor, I am sure --

THE COURT: He is not an adversary in this case Mr. Potter.

MR. POTTER: Not an adversary in this case, I am sorry. But if this case were taken out of this courtroom and moved into an arbitration proceeding, he would be there merely one side of that issue.

THE COURT: Mr. Weiss, do you have anything to add?

MS. DAVIS: I would like to add somthing, Your Honor. That is that Mr. Potter has argued, at least in the pretrial proceedings and perhaps will again raise the issue of local custom and practice. And I think that it is in view of that argument that the government has asked Mr. Mullen about whether the policy -- or the practice of the company has been to condone this practice or not. It is an appropriate question to ask of this man. But that doesn't necessarily mean that it's also appropriate to ask him about the agreement and the terms of the specific agreement, which he has only passing familiarity with.

MR. LONGOBARDI: Passing familiarity?

THE COURT: The witness has testified he has a general familiarity. And I think as long as the questions go to his

general knowledge in working with it, then a proper foundation has been laid.

(End of sidebar conference.)

BY MR. POTTER:

Q: Mr. Mullen, a while ago I asked you a question as to whether there is anything in the contract that prohibits a timekeeper from working two ships at the same time for different companies that hire casual timekeepers. Can you answer that question?

A: Yes, you asked me that question.

Q: That is the question I asked you before. I am asking that question again.

A: Not to my knowledge, there is not.

Q: There is nothing in the contract that prohibits that, that is what your answer is?

A: To the best of my knowledge.

Q: To the best of your knowledge. Are

you aware of whether or not there has ever been an arbitration through the PMTA on a question such as that?

A: No, not to my knowledge.

Q: PMTA, of course, on the one side, the timekeepers on the other?

A: Not to my knowledge.

Q: Not to your knowledge. The prosecutor asked you if you condoned it, you said you did not condone it?

A: That's correct.

Q: That is, you don't like it, from your side, but to the best of your knowledge, there is nothing in the contract that prohibits it?

MR. WEISS: Your Honor, I object. Asked and answered.

THE COURT: It has been asked and answered.

MR. POTTER: It as been, Your Honor. I agree.

BY MR. POTTER:

Q: You have indicated that you know Mr. Cooper for a number of years.

A: Yes.

Q: As far as you are concerned, is he reliable?

A: Yes.

Q: Now, what is your understanding of who hires members of gangs, that is, gangs meaning the crews that load and unload the cargo?

A: The foremen hire their own men.

Q: The foremen hire their own men?

A: Yes, sir.

Q: And he can fire those men if they don't do the job right?

A: Yes.

Q: The timekeeper has no say over who hires or fires member of that gang?

(3)

Supreme Court, U.S.
FILED
FEB 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-958

In the Supreme Court of the United States

OCTOBER TERM, 1988

ARTHUR JAMES COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
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11pp

QUESTIONS PRESENTED

1. Whether petitioner, who obtained money from his employer by means of false representations, was properly convicted of violating the wire fraud statute, 18 U.S.C. 1343.

2. Whether petitioner obstructed justice under 18 U.S.C. 1503 by attempting to induce another person to commit perjury on his behalf.

3. Whether the district court erred in its evidentiary rulings.

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134 Cong. Rec. S17375 (daily ed. Nov. 10, 1988)	4

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-958

ARTHUR JAMES COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A5) is reported at 860 F.2d 1076 (Table). The opinion of the district court (Pet. App. A26-A42) is reported at 677 F. Supp. 778.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1988. A rehearing petition was denied on October 5, 1988. The petition for a writ of certiorari was filed on November 10, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Delaware, petitioner was convicted on 39 counts of wire fraud, in violation of 18 U.S.C. 1343,

and one count of obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to concurrent one-year terms of imprisonment on each wire fraud count, and to a concurrent four-year term of imprisonment on the obstruction of justice count. The court of appeals affirmed. Pet. App. A1-A5.

The evidence at trial is summarized in the government's brief in the court of appeals (Gov't C.A. Br. 3-8). It showed that petitioner worked as the primary timekeeper for Southern Stevedoring Company between September 1984 and February 1986. On 67 days during that period, petitioner's son Timothy was listed as the timekeeper on Southern Stevedoring's payroll timesheets, even though he was a high school student at the time and had never worked as a timekeeper. Timothy was paid by Southern Stevedoring for those days. On 62 of those 67 days, petitioner worked as the timekeeper for one of the other two stevedoring companies operating at the Port of Wilmington and was paid by one of those companies. None of the companies would have permitted petitioner to work for two companies at the same time. Gov't C.A. Br. 4-7. The false representation that petitioner's son Timothy was working as a timekeeper for Southern Stevedoring formed the basis for the wire fraud charges against petitioner.

Following his indictment, petitioner met with a terminal supervisor, Ken Scheffel, and asked him to testify that Timothy had worked for Southern Stevedoring as a "runner." Scheffel told petitioner that he did know what a runner was and that he would not perjure himself. Scheffel subsequently reported petitioner's contact to his manager, and the contact became the subject of the obstruction of justice count against petitioner. Gov't C.A. Br. 7-8.

ARGUMENT

1. Relying on this Court's decision in *McNally* v. *United States,* 483 U.S. 350 (1987), petitioner contends (Pet. 22-28) that his conduct did not constitute fraud. Specifically, he maintains that Southern Stevedoring suffered no monetary loss as a result of his misrepresentations regarding his son's employment because it would have had to pay someone to perform timekeeper duties in any event, and that for that reason his wire fraud convictions cannot stand under *McNally.* There is no merit to this contention.

In *McNally,* this Court reversed the defendants' mail fraud convictions, which had been based on the theory that their conduct had deprived the citizens of Kentucky of their intangible right to honest and impartial government. Subsequently, in *Carpenter* v. *United States,* No. 86-422 (Nov. 16, 1987), this Court upheld the wire fraud conviction of a writer of a column for the Wall Street Journal who traded on his knowledge of what the column would say. The Court made clear, contrary to petitioner's contention, that a scheme to defraud does not require proof that the victim of the scheme lost money, but only requires that he was deprived of a property interest of some kind. Slip op. 7. Here Southern Stevedoring was deprived of the right it had paid for—the exclusive services of a full-time timekeeper—rather than, at best, sharing petitioner's services with other employers. That interest constitutes a property right at least as readily cognizable as the interest at issue in *Carpenter*—the Wall Street Journal's right to exclusive control over the information it would publish.

Moreover, as the district court concluded (Pet. App. A32-A42), the jury in this case, unlike the jury in *McNally,* was instructed under the second clause of the wire fraud statute, which proscribes schemes to obtain money by false representations. (The first clause, which was at

issue in *McNally,* proscribes schemes to defraud.)[1] While under *McNally* the victim of a "scheme or artifice to defraud" must be deprived of a property interest, proof that a victim sustained a property loss has never been required under the second clause of the fraud statutes. All that is required by that clause is that the defendant's scheme contemplate that he would obtain money or property by means of misrepresentations.

In any event, there is no reason to grant review in this case to determine whether petitioner's conduct violated the mail and wire fraud statutes as construed in *McNally.* Congress recently amended the federal fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right to honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603 (Nov. 18, 1988). The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17375 (daily ed. Nov. 10, 1988). Thus, the question whether fraud convictions of the type at issue in this case are consistent with *McNally* is of no prospective importance.

2. Petitioner also contends (Pet. 28-33) that his conviction for obstruction of justice under 18 U.S.C. 1503 must be reversed because witness tampering does not violate Section 1503, but is barred only by 18 U.S.C. 1512. There is no merit to that contention.

Section 1512 prohibits the use of physical force, threats, or "misleading conduct" against witnesses to influence

[1] The wire fraud statute, like the mail fraud statute, proscribes "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1343 (emphasis added).

their testimony or prevent them from testifying. It does not reach other efforts to induce a witness to remain silent or commit perjury. Conduct of that sort falls within the reach of Section 1503, the general obstruction of justice statute. When Section 1512 was enacted in 1982, Section 1503 was amended to delete express references to witnesses. However, Section 1503's "omnibus" or "residual" clause, which generally prohibits "influenc[ing], obstruct-[ing], or imped[ing], or endeavor[ing] to influence, obstruct, or impede, the due administration of justice," was not amended. By retaining that clause, Congress left undisturbed decisions holding that Section 1503 reaches efforts to obstruct the administration of justice by influencing witnesses for corrupt purposes. See, *e.g.*, *United States* v. *Johnson,* 605 F.2d 729, 730-731 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980). If Section 1503 were not construed to cover acts of influencing witnesses other than those covered by Section 1512, there would be a serious gap in the statutory coverage. Not surprisingly, no court has held that such conduct falls outside the reach of Section 1503. See, *e.g.*, *United States* v. *King,* 762 F.2d 232, 236-238 (2d Cir. 1985), cert. denied, 475 U.S. 1018 (1986).

Petitioner notes (Pet. 30) that there is a conflict among the circuits on a related issue—whether witness intimidation of a type that *does* fall within Section 1512 is also covered by the omnibus clause of Section 1503. The Second Circuit has held that Section 1512 is the exclusive remedy for such conduct. See *United States* v. *Hernandez,* 730 F.2d 895 (1984). Every other circuit that has addressed the issue has held that acts of witness intimidation that violate Section 1512 may also be prosecuted under the omnibus clause of Section 1503. See *United States* v. *Branch,* 850 F.2d 1080 (5th Cir. 1988), cert. denied, No. 88-5565 (Jan. 9, 1989); *United States* v. *Risken,* 788 F.2d 1361 (8th Cir.), cert. denied, 479 U.S. 923 (1986); *United States* v.

Rovetuso, 768 F.2d 809 (7th Cir. 1985), cert. denied, 474 U.S. 1076 (1986); *United States* v. *Lester,* 749 F.2d 1288, 1291-1296 (9th Cir. 1984). While we believe that the majority rule is correct, there is no need to address that question in this case because even the Second Circuit agrees that conduct of the sort involved in this case—conduct directed toward witnesses that does not fall within the reach of Section 1512—is within the scope of Section 1503. See *United States* v. *King, supra.* There is therefore no conflict among the circuits on the issue presented in this case.

Petitioner also contends (Pet. 30-33) that the evidence does not support his conviction for obstruction of justice. He maintains that he merely asked Scheffel to be a witness on his behalf, and did not try to influence his testimony. But Scheffel testified that petitioner asked him to testify falsely that petitioner's son Timothy served as a "runner" for Southern Stevedoring and that Scheffel immediately told petitioner that he would not perjure himself on petitioner's behalf. Pet. App. A98-A106. From that evidence, the jury properly concluded that petitioner attempted to induce Scheffel to commit perjury at petitioner's upcoming trial.

3. Finally, petitioner contends (Pet. 33-44) that the district court erred in several of its evidentiary rulings.

First, petitioner complains (Pet. 33-39) that Scheffel's testimony (Pet. App. A122-A124) that he had noted irregularities on Southern Stevedoring's timesheets (other than the listing of petitioner's son Timothy as a timekeeper) unfairly prejudiced petitioner. But Scheffel did not mention petitioner in the brief testimony about which petitioner complains, and petitioner did not object to that testimony at trial. This claim of error therefore could not possibly justify reversal of petitioner's conviction.

Petitioner next suggests (Pet. 39-40) that the district court should not have admitted into evidence proof that petitioner was paid by other stevedoring companies on 62 of the 67 days that he falsely listed his son Timothy as Southern Stevedoring's timekeeper. In petitioner's view, that evidence was "irrelevant" (Pet. 39). To the contrary, that evidence was highly relevant, as it showed how petitioner profited from his fraudulent scheme, by obtaining double compensation for his work.

Finally, petitioner argues (Pet. 40-42) that the district court unfairly prevented him from establishing as a defense that working for two employers at the same time, or "doubling," was permitted at the Port of Wilmington. But petitioner's son Anthony testified that he had received notices suggesting that doubling was permitted, and he read into evidence a letter allegedly approving doubling. The district court merely barred the introduction of a similar letter during cross-examination of another witness on the proper ground that Fed. R. Evid. 608 bars impeaching a witness with extrinsic evidence. Pet. App. A118-A121. The district court also ruled, on hearsay and remoteness grounds, that a union official could not testify that two other people had agreed that doubling was permitted in the mid-1970s. The court held that the official could testify to anything he personally observed at the Port of Wilmington (*id.* at A112, A115). Those rulings each correctly applied the governing evidentiary principles. Petitioner accordingly has no ground for complaint.[2]

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[2] Petitioner also contends briefly (Pet. 42-43) that the court permitted the government undue latitude in cross-examining defense witnesses. He does not specify why he believes the cross-examination of any defense witness was improper. Contrary to his suggestion, the rules of evidence permit a witness to be cross-examined about acts of misconduct if the evidence bears on the witness's credibility. See Fed. R. Evid. 608(b).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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